Produce, Fresh & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florists, Nursery, Landscape & Allied Employees, Drivers, Chauffeurs, Warehousemen & Helpers Union Local 703, International Brotherhood of Teamsters, AFL–CIO *and* Testa Produce, Inc. Case 13–CB–14482

April 22, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 25, 1995, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Produce, Fresh & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florists, Nursery, Landscape & Allied Employees, Drivers, Chauffeurs, Warehousemen & Helpers Union Local 703, International Brotherhood of Teamsters, AFL–CIO, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the Order.

Denise R. Jackson, Esq., for the General Counsel.
Robert E. Bloch, Esq. (Dowd & Bloch), of Chicago, Illinois, for the Respondent.
Scott A. Gore, Esq. (Laner, Muchin, Dombrow, Becker, Levin & Tominberg), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was tried in Chicago, Illinois, on a complaint issued pursuant to charges filed by Testa Produce, Inc. (TPI).[1] The complaint alleges that Produce, Fresh & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florists, Nursery, Landscape & Allied Employees, Drivers, Chauffeurs, Warehousemen & Helpers, Union Local 703, International Brotherhood of Teamsters, AFL–CIO (the Respondent or Union) violated Section 8(b)(3) of the National Labor Relations Act (the Act), by refusing to execute a written collective-bargaining agreement embodying a complete agreement on terms and conditions of employment that had been ratified by the bargaining unit employees on December 27, 1993.[2] The Respondent, in its timely filed answer, denied the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel, the Charging Party, and the Respondent, have been carefully considered.[3] On the entire record, including my obser-

[1] We adopt the judge's conclusion that the Respondent violated Sec. 8(b)(3) by refusing to finalize and execute a collective-bargaining agreement containing the terms and conditions of employment ratified by the unit employees. However, we do not rely on the judge's discussion of *Teamsters Local 703 (Anthony Marano Co.)*, Case 13–CB–14424 (June 27, 1995) (not reported in Board volumes).

[2] The Respondent excepts, inter alia, to the judge's finding that the parties agreed that the Employer could hire a food service support complement not exceeding 80 percent of the number of driver and warehouse positions in existence on the date of the final offer, despite language in the ratified final offer limiting the number of support employees to 80 percent of only the existing driver positions. To the extent that the judge has supplied a contract term to which the parties have not agreed and which is in contravention of the ratified final offer, we find merit in the Respondent's position and do not adopt the judge's finding regarding the agreed-on number of new hires. See generally *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). We find, however, that the judge properly recommended that the Board order the Respondent to execute a collective-bargaining agreement containing the ratified terms. Thus, we adopt the judge's proposed remedy and recommended Order, which direct the Respondent to execute a bargaining agreement, upon request. In our view, the agreement includes a provision limiting the number of food service support employees to 80 percent of the number of driver positions in the bargaining unit as of December 11, 1993.

[1] The charge was filed by TPI on July 8, 1994, and the complaint was issued on August 4, 1994. The hearing was held on March 15 and 16, 1995.

[2] The parties stipulated that as of November 1993, when they began contract negotiations, the bargaining unit represented by the Union consisted of drivers, helpers, and warehouse persons, but excluded all sales personnel, office clerical employees, guards, and supervisors within the meaning of the Act. The General Counsel and Respondent further agree that the same bargaining unit was modified as a result of the collective-bargaining negotiations to include all full-time and regular part-time drivers, warehouse persons, food service support/utility employees, and strippers/repackers employed by the Employer at its Chicago, Illinois facility, but excluding all sales personnel, office clerical employees, maintenance and quality control personnel, guards, and supervisors within the meaning of the Act. It further was stipulated that both descriptions encompass the same persons performing the same work except that the latter unit description included disputed newly established classifications.

[3] The Respondent Union having been unable for good cause shown to submit its posthearing brief when the other parties' briefs were timely received, was granted an extension of time. Concurrently, to avoid resultant disadvantage, the General Counsel and the Charging Party, TPI, were given leave to file reply briefs which, too, have been received and duly considered. Thereafter, on June 6, 1995, counsel for the Respondent Union moved that pp. 5 and 6 of the General Counsel's reply brief be stricken on the ground that the General Counsel there improperly alleged that the movant had been less than forthright with the Board and myself in characterizing his role in reviewing a contract draft that had been sent to him by TPI after that Employer assertedly was induced to withdraw its original

vation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

TPI, a corporation, has been engaged in the wholesale distribution of produce from its office and place of business in Chicago, Illinois, where it annually purchased and received goods valued in excess of $50,000 directly from points outside the State of Illinois. The Respondent admits and I find that TPI is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Parties' Positions*

The General Counsel and TPI contend that the Respondent Union has unlawfully refused to execute an agreed collective-bargaining agreement that had been duly ratified by the affected employees. Prior to its March 31, 1993 expiration, TPI's employees had been covered by the Market Services Association (MSA) contract with the Respondent. This was a multiemployer collective-bargaining agreement that also had governed the employment terms of the employees of about 60 produce wholesalers who, like TPI, were located in Chicago's South Water Street Market (the Market). The General Counsel and the Charging Employer argue that TPI's asserted new contract with the Union, negotiated and ratified while the Respondent was in trusteeship, was to be its first separate bargaining agreement with the Union and that the Respondent's subsequently elected officers, who had replaced the trustees in administering the Union, were resistant to accepting the trustee-negotiated contract because it contained concessions to this Employer unavailable under the expired MSA agreement and, foreseeably, under the new MSA contract as well. As argued by the General Counsel and TPI, the union representatives, after bargaining with respect to the Employer's final proposal at the second negotiating session on December 12, 1993, had shaken hands with the Employer's negotiators, had announced that the parties had a contract, and had submitted for employee ratification a summary of 22 employment terms represented as modifications to the March 31, 1993, expired, MSA labor agreement. After having been informed on December 27, 1993, by the Union's then-assistant trustee and principal negotiator that the contract had been ratified on that date, TPI put the agreement into effect. This included giving each eligible unit employee a signing bonus on ratification and a pay raise in the amounts specified. These parties assert that their contention that agreement had been reached is strengthened by the Union's requests for minor language changes to the successively submitted drafts and that the Respondent Union has sought to justify its later refusal to execute these draft agreements by a series of shifting defenses that will be considered below. Finally, it is argued that the contract concessions were made because the Union had recognized TPI's special needs as a small operator which, unlike most of the wholesalers in the Market who served large retailers, sold in less than crate-size quantities to customers as diminutive as hot dog stands, and because of strong competition.

The Respondent Union asserts that it had not agreed to the terms of a new collective-bargaining agreement with TPI in that the Union's negotiators at the final bargaining session had openly rejected at least three key Company bargaining proposals, had submitted TPI's final offer to ratification vote only because of a sense that a vote on any employer-submitted final offer was required in the bylaws and, accordingly, had unsuccessfully recommended that the membership vote to reject the contract. Contrary to the General Counsel and TPI, the Union contends that, consistent with the parties' undisputed agreement at the bargaining table, the 22 ratified employment terms were to be modifications to, and generally contain, applicable prospective language of the new MSA contract then being negotiated as opposed to the multiemployer agreement that had expired on March 31, 1993, and that the employees had been so informed before the vote. Accordingly, the Respondent argues that its officials' failure to sign the proffered draft contracts was not unlawful because negotiations with TPI had not been concluded but were contingent on the outcome of negotiations for the new MSA

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unfair labor practices charge related to the issues here. In this regard, Peter Testa, TPI's president, testified that he had withdrawn the first charge on the advice of counsel who had assured him, from information received from the Respondent's attorney, that the Respondent Union would sign the a collective-bargaining agreement after the charge was withdrawn and minor language changes were inserted. TPI, accordingly, had withdrawn the charge, had made those changes and had resubmitted the revised draft contract to the Union's attorney for signature by the Respondent, again unsuccessfully. The Respondent's counsel contends that Testa's testimony as to the reasons why the charge was withdrawn was uncorroborated hearsay; that there had been no deal, as such, to sign the contract and that, contrary to the General Counsel, the Union's attorney had had no particular knowledge of the contents of the draft that followed. The Respondent Union's counsel notes that it was stipulated in the record that he then had assigned a paralegal in his office to review TPI's revised contract draft and to compare it with the expired Market Services Association (MSA) contract, the multiemployer agreement that had covered the produce wholesalers' employees in the relevant South Water Street Market; and that the Respondent's attorney subsequently had given the compared documents, including passages highlighted by the paralegal, a cursory review before sending the referenced documents to TPI. The matters raised in this motion and the attendant events are of only marginal relevance to the determination made here. Although Testa was entitled to testify concerning his reasons for withdrawing the initial charge, even if such account relates only to his rationale and not to the truth of any contract signature deal with the Union, the way in which the Union's counsel processed the resubmitted draft could well have led to a misunderstanding by outside parties as to what was intended. After the resubmitted contract draft was reviewed in the office of the Respondent's counsel and sent back to TPI with certain markings, accompanied by other associated documents, that Company could hardly be expected to know whether the forwarded law office work product had been internally critiqued by the Respondent's counsel or his paralegal, by both, or by neither. In the context of the parties' dealings at the time, with the successive submission of TPI drafts for signature, Testa reasonably could have concluded that the draft received from the Union's attorney with apparently indicated corrections had been transmitted for action of the type taken. As stated, while the Respondent's counsel's actions in this regard may have created a measure of misunderstanding, if not confusion, I find no intentional misrepresentations on his part and no basis to strike the disputed segment of the General Counsel's reply brief.

contract; that there were substantive discrepancies in draft contracts submitted to the Union by TPI for signature; and that, because there had been no meeting of the minds on an agreement, it was not the Union's responsibility to help TPI draft an acceptable contract.

B. *Background*

TPI, located in Chicago's South Water Street Market, here the Market, the wholesale produce distribution center for the Midwest, was a small produce wholesaler, known in the industry as a ''doghouse.'' This appellation was applied because such smaller operators, instead of supplying large retail establishments in stately fashion as did most produce wholesalers at the Market, generally ''ran around'' selling in lesser quantities to hospitals, hotels, restaurants and, eponymously, even to hot dog stands. Some sales, particularly to walk-in customers, were in less than crate-size amounts. TPI's president and principal was Peter Testa.

In November 1991, TPI had adopted the then-current MSA contract with the Respondent Union authorizing MSA to bargain on its behalf and it is undisputed that TPI, like the other so-called ''independents'' at the Market, was bound by the provisions of the MSA collective-bargaining agreement until its March 31, 1993 expiration. The MSA contract covered approximately 500 employees of about 60 produce wholesalers in the Market. By letter, dated August 2, 1992, TPI, as around then did about 12 other employers, gave notice to the Union that it was withdrawing from its multiemployer relationship and thereafter would separately negotiate its collective-bargaining agreements with the Union. Of TPI's approximately 45 employees based at the Market, only about 25 were in the bargaining unit, the rest being sales, office and miscellaneous personnel. As of December 1, 1993, TPI's unit included only about 15 full-time employees—9 drivers and 6 inside, or warehouse, employees. Until after the December 27, 1993 ratification vote, TPI employed no part-time unit personnel.

At all relevant times before January 28, 1994, when its own elected officers assumed control, the Respondent Union, Teamsters Local 703, was under trusteeship. The trustee, Robert T. Simpson Jr., concurrently president of Teamsters Local 743,[4] was so appointed in January 1993 by International Brotherhood of Teamsters General President Ron Carey. Simpson, in turn, had named Richard Howes, an experienced negotiator and business representative of Local 743, as the Respondent's deputy trustee to assist him at Local 703. In February 8, 1993 letters sent to all Local 703 employers, Simpson advised, inter alia, that Howes thereafter would be his representative with full authority to represent the Respondent, therein simultaneously replacing the previously incumbent business representatives. Howes' authority to act for the Union during its subsequent negotiations with TPI is undisputed.

[4] Because Local 743, the largest Teamsters local, the Teamsters organization, represented, inter alia, clerical, technical, and warehouse employees, but no employees in the produce industry, the Respondent's province, there was no representational overlap or interest conflict between the two unions.

C. *The Facts*

1. The bargaining sessions

The record shows that TPI and the Respondent held negotiating sessions for a separate collective-bargaining agreement at the Respondent Union's offices on the following two dates:

a. *November 11, 1993*

Union Trustee Howes gave the most detailed testimony concerning the undisputed events of the first, November 11 bargaining session. TPI was represented by Attorney Earl Bailey[5] and Company President Peter Testa, while Howes, and Business Agents Sam Seanna and Tyrone Simpson, Trustee Simpson's son, appeared for the Respondent.

Howes related that at the first session, which lasted 60 to 90 minutes, the parties worked from TPI's original proposals, which were given to the Respondent at that meeting. The Company's proffered unit description modified that of the expired MSA contract by proposing adoption of new job classifications, not within the previous agreement, those of utility men, strippers/repackers, and food service helpers. Some of the work proposed to be done by utility men previously had been performed by warehouse workers covered under the expired MSA collective-bargaining agreement. Food service support employees were the equivalent of utility workers and were to perform all jobs required within TPI's organization. Their functions also had been filled by warehouse employees under the old MSA contract. The proposed work of strippers/repackers, who basically went through rotten and faded produce, pulling out and repacking for sale to consumers whatever appeared to be salvageable, also previously had been done by warehouse workers. In addition, some of the work proposed for strippers/repackers and utility employees had been done under the MSA contract by drivers. Although drivers were the highest classification covered under the collective-bargaining agreement, in some Market operations, the drivers could work below grade, loading trucks.

Howes testified that he had objected to the part of the Company's November 10 proposal that would increase the number of designated owners from one to three. Howes explained that each employer could designate and place one owner into the bargaining unit. Such designated owner could then belong to the Union and, as a member, be included in the pension, health, and welfare funds, and enjoy all other unit benefits while also performing bargaining unit work. Testa could name himself a designated owner.

Howes could not recall the Union's position as to the proposed elimination of all premiums for early-start or for work-after shift, explaining that his bargaining sessions notes, left at the Local 703 offices, had disappeared. He had had no fundamental objection to the Company's proposal to eliminate double-time premium pay for Saturday work. Howes did see potential problems with the proposal guaranteeing a 40-hour week, because it would make the time-and-one-half overtime premium operative only after 40 hours had been worked in a week. This would eliminate overtime pay after

[5] Bailey also was one of the two attorneys representing MSA in its concurrent contract negotiations with the Union. After the ratification vote, Scott A. Gore became TPI's counsel, succeeding Bailey.

8 hours in a day. TPI's proposal to enable employees to start their workweek on any day as long as the workweek contained 40 hours was acceptable to the Union as, possibly, was a proposed no-strike grievance procedure.

With respect to the Company's proposal that there be a drug and alcohol testing program, Howes testified that there had been much discussion about such programs during the MSA negotiations and that the Union was drafting language for such a provision to also be incorporated into any agreement with TPI. The Respondent rejected so much of the Employer's drug check proposal as called for random testing. Howes' notation of ''45 days'' next to the item in TPI's proposal that the probationary period be changed to 120 days, indicated that the shorter period was what then was being discussed in the MSA negotiations.

Howes emphasized that, at the November 10 negotiating session, he told Testa that any language that was not specific to the ''doghouse,'' or Testa, agreement would have to be the same as in the forthcoming MSA contract and that, except for specifically negotiated changes, he would not sign a collective-bargaining agreement with them that differed from the forthcoming MSA contract.[6] Bailey had accepted this and there was tacit agreement that it would be necessary to wait for the MSA contract to be finalized in order to know exactly what the language would be for the Testa agreement. No agreement was reached during the first negotiating session.

After the November 10 negotiating session, on November 15, the Company sent the Respondent a series of followup proposals calling for the lower pay rates for employees in the above-referenced new classifications. Howes did not accept this. Testa was not certain that that document ever was resubmitted to the Union.

b. *December 11, 1993*

Testa gave the most detailed testimony of what occurred at the next and final, 5-hour bargaining session, held on December 11, 1993. This meeting was attended for the Company by Testa and Bailey, while Howes and trustee Robert Simpson appeared for the Union. At that meeting, the Company gave the Union its final offer from which the parties worked.

Testa related that complete agreement was reached by the conclusion of the December 11 session on all outstanding issues, that the parties agreed that they had a contract and that all that there remained to do would be to reduce the agreement to a final written summary and get a membership ratification vote. In explaining how the parties reached agreement during that meeting while providing context for union objections, Testa provided the following description concerning their discussion of the 22 items in TPI's proposal:

Item 1, relating to pay premiums for early or after-shift work, and item 2, workweek modifications, were discussed at both bargaining sessions. Howes and Simpson had wanted increases in the pay premiums, while the company representatives stated their desire to keep such increases to a minimum. Both parties compromised with an increase of 25 cents/hour. As to modifying the workweek, the parties agreed that the Company could start employees on either Sunday, Monday, or Tuesday but must schedule employees for 5 consecutive workdays thereafter. Accordingly, the workweek for an employee who started his week on Sunday would end on Thursday, so that such employee would be entitled to time and one-half pay for overtime work on Friday. On December 11, the Union agreed to this provision, including the 40-hour work guarantee, which had been discussed at both sessions.

Items 3 and 4 were considered together. Item 3, the 40-hour-per-week work guarantee and that also called for elimination of the 80-percent rule,[7] combined with item 4, that time and one-half be paid for all hours worked over 40 in 1 week or after 10 hours in 1 day, but not for both, were proposed to enable TPI to send employees home early on days within their workweek when the Company was not busy, and to work them at straight time for up to 10 hours on a following day should the Employer so require. After working the 10-hour day, the employee would become entitled to time-and-one-half overtime premium pay. Testa explained that the Company had wanted to get rid of the 80-percent rule in order to acquire the flexibility to work all unit employees for less than 8 hours without having to pay the senior-most 80 percent for the full 8 hours while, also, being able to work employees for 10-hour days at straight time. The parties also agreed that Saturdays would be paid at the overtime premium because it would be every employee's sixth day of work.

Item 5, addition of a no-strike grievance procedure to the contract, also was discussed at both sessions. It was agreed on December 11 that, in conformity with the industry standard, there would be a no-strike provision in the contract.

Item 6, proposing that the Union be notified of, and given 48 hours to refer employees to fill, any vacancies, was agreed. This would enable to Union to send members on layoff or out of work elsewhere in the industry to fill open positions at the Company. This was a ''must'' provision for the Union to which the Company did not object.

As to item 7, drivers being permitted to do other bargaining unit inside work while not driving, the parties agreed that because of the way TPI ran its doghouse operation, it did no good to have a driver standing around waiting for his truck

[6] The MSA contract was ratified on December 20, 1993, about a week before the ratification vote by TPI's employees, the terms having been presented to the employees in a summary format similar to that subsequently submitted to TPI's employees. This method of proceeding required that the parties to the new MSA contract work out additional language to finalize their bargaining agreement. Since an April 11, 1995 complaint in Teamsters Local 703 (Market Services Assn.), Case 13–CB–14633, issued by the Board's Acting Regional Director for Region 13 after the close of the hearing in this matter, of which judicial notice is taken, alleges that this Respondent violated Sec. 8(b)(3) of the Act by refusing to execute, and by thereafter repudiating, the written contract it reached with MSA on January 13, 1995, it would appear that that finalization process has not yet been completed.

[7] Under art. 6 of the expired MSA contract, the there provided 40-hour guaranteed workweek applied only to those employees who were in the top 80 percent of seniority, but did not apply to those at the bottom 20-percent level. The newer employees were covered by a schedule based on the number of employees in a given employer's employ. Under the 80-percent rule in the expired MSA contract, employees in the top 80 percent of the seniority list also were guaranteed 8 hours pay each day even if sent home after working only half that. Only employees in the bottom 20 percent could be worked for less than an 8-hour day without being entitled to be paid for the entire 8 hours.

to be loaded. Rather, if he wanted to finish his work earlier and leave, the driver could help with the loading. The Union did not consider this point to be significant because all doghouse operations were basically run that way and the relevant provision merely legitimized the existing doghouse practices.

With respect to item 8, the addition to the collective-bargaining agreement of a formal Drug and Alcohol Testing Program, the Company, recognizing the difficulties involved, including those in meeting Federal requirements and in conflicting desires, agreed to whatever program the Union wanted to set up and to use the Union's language.

Item 9, to extend the probationary period from the 30 days in the original proposal and the MSA contract to 45-calendar days, was adopted after discussion at both sessions because the parties recognized that 30 days was too short a period to determine whether a new employee would be a good warehouseman or driver, or if he knew anything about the produce industry. The Company had sought 90 days, but at the second session had agreed to the 45-day period with a proviso that extensions of the probationary period could be granted with the parties' mutual consent.

On item 10, customers pulling their own orders, not to exceed a single handcart load, when on the Company's premises, the parties agreed, in effect, that such proposal covered a de minimus situation because there was little walk-in business; at most, two such customers a day.

Item 11, subcontracting work, was a difficult topic on which agreement was reached. The Company would not be free to subcontract work to eliminate its own employees, but if a delivery had to be made in a radius of more than 100 miles from the Market, then TPI could subcontract it.

As to item 12, health and welfare insurance, TPI agreed to the Union's demand that it increase its premium contributions because health and welfare costs kept going up every year. Accordingly, the parties agreed that TPI's per capita premium would be raised to $460/month, which came to an increase of about $20 per month per employee. It also was provided, with full Company concurrence, that changes in subsequent years would be provided.

The parties agreed to item 13 that provided that employees who were off the active payroll would have continuation of medical insurance and other fringe benefits for a maximum of 5 months. Discussed at both meetings, the accord on this measure, which was finalized on December 11, reduced that interval from the 10-month continuation period that had existed under the former MSA contract. According to Testa, neither party considered this change to be a ''big deal.''

As agreed, item 14 capped vacations for current employees at their then-existing levels and gave new hires a maximum of 3 vacation weeks. The Company had taken the position that the vacation schedule under the expired MSA contract, pursuant to which employees could receive a maximum of 5 weeks of vacation with 5 personal days, had been excessive. The Union, recognizing that the Company did not have ''old'' employees who had been employed sufficiently long as to have accrued more than 3 weeks' vacation, agreed on December 11 to cap annual vacations at a maximum of 3 weeks plus 5 personal days. Testa related that, because the employees generally used their personal days for vacations, that benefit remained greater than represented.

Pension benefits, under item 15, were discussed at length. The Union accepted TPI's position that the $320/month per employee contribution required under the earlier MSA contract was too high for a doghouse operation and the Union agreed to reduce TPI's monthly contribution to $200/month per employee, subject to ratification.

In negotiating item 16, the Company's expressed interest in eliminating the existing severance fund provision sparked bitter debate. TPI expressed its view that, in the alternative, other outside financial arrangements could be made for employees and that setting up a 401(k) account for each member would be preferable to a severance fund. Although the severance fund had required a per capita contribution of $275/month, the Employer proposed to contribute only $200/month—a savings of $75/month per employee. Although the union representatives considered this to be a big concession, they finally stated that they could go along if the employees voted to ratify it. Accordingly, on December 11, the parties agreed, subject to employee ratification, to replace the severance fund with the 401(k) investments.

As to item 17, an agreement was reached on December 11 to prorate fringe benefits when employees worked less than a full month, after discussions at both negotiating sessions. The Company's stated concern was that if an employee worked 1 day in a month, instead of being compelled to pay the entire $735[8] monthly contribution for that individual, the contribution could be prorated. Accordingly, the parties agreed that it would be fairer to compute benefits entitlements by weeks rather than by months so that if Testa asked the Union to send him a replacement for a sick employee and the replacement worked only 2 days, the Company could pay that replacement a full week's benefits rather than for an entire month. Under the former MSA agreement, such benefits could ''snowball.'' If on the day after leaving TPI, the same replacement went to work for another company, he instantly could acquire entitlement to another month's worth of benefits.

Although the parties agreed in Item 18 that a ''zipper clause'' would be included in the agreement. Testa did not know what a zipper clause was; the matter having been raised by TPI's attorney, Bailey, who discussed and reached agreement on the matter with Howes.

In item 19, the Union and TPI agreed to ''a most favored nations'' clause,[9] to apply to any food service wholesalers who used two or more trucks with whom the Union made any agreement within 50 miles of downtown Chicago and up to 100 miles of downtown for satellites of companies. Testa explained that his business was very competitive and that such clause, which was agreed to on December 11, would put everyone with a Local 703 contract on the same level as Testa Produce. So as to not be too restrictive, the parties settled on a 50-mile radius of downtown as a limitation. The

[8] Although Testa testified that his entire monthly fringe benefits payment under the former MSA contract had been $1100, the $735 figure more accurately represents the total of TPI's component payments for health and welfare ($140), severance ($275), and pensions ($320).

[9] In providing ''most favored nations'' clause in a labor agreement, the Union commits to signatory employers that, should it thereafter enter into a collective-bargaining agreement with another employer in the prescribed industry and geographic area containing terms that are more favorable to that other employer than had been made available to them, the Union then will extend to them the same contract treatment.

expired MSA contract did not contain a ''most favored nations'' clause.

Item 20 established the wages of the two new job classifications of strippers-repackers and food service support-utility, with a result that employees in those classifications would earn less than TPI's current employees performing comparable duties covered under the MSA agreement. This item provided that the prospective repackers-repackers and food service support employees, unlike other TPI's existing bargaining unit employees, would have health and welfare benefits as their only fringe benefit,[10] that the number of driver positions then held by unit employees would be retained and that no more than 80 percent of the bargaining unit positions could be classified as ''support help.'' Testa related that the institution of these classifications, the involved duties and pay rates were discussed and agreed. He explained that repackers-repackers, who salvaged and repacked produce for sale, would principally benefit his type of operation when packages were broken down into smaller quantities and when two or four bunches from a given case of produce might be sold at a time. Accordingly, Testa told Simpson and Howes that he needed this classification at the proposed lower pay rates to preserve his competitiveness.[11] TPI offered that the proposed new repackers-repackers classification and pay rates apply only to new hires and not effect the jobs or the pay scales of those then working there. Although the Union would not agree to the new classification if it meant that anyone would lose their jobs, its representatives, noting that the new classification probably would mean that TPI might hire people and that it could be a good way of creating jobs without reducing the pay of any currently employed worker, agreed to that proposal.

Similar discussions were held concerning food service support-utility employees. Employees in that category could drive trucks, make deliveries, work inside, and do the work of repackers-repackers—almost everything. The union representatives understood that the Company was facing outside competition that paid lower wage rates, that it needed some relief and that this would be a good way to accomplish this but, again, only with respect to new hires. Employees in this new classification, too, would receive health and welfare as their only fringe benefit. Their pay would be higher than for the repackers-repackers, but still below the rates for comparable work under the MSA agreement.

As agreed, the application of both classifications was to be restricted in that only 80 percent of the number of unit employees in inside (warehouse) and drivers' positions could be classified as ''support help.'' In assessing the size of the unit from which the 80 percent was to be drawn, it would be necessary to include the number of permanent positions to be retained. On December 11, the Company had nine drivers and six warehouse employees and those numbers of employees in those classifications would have to stay constant during the contract term.[12] Before the Company could hire new employees into the newly formulated classifications, it would have to fill any subsequently arising vacancies in those six driver and nine warehouse jobs. Testa explained that, in order to hire employees into the new classifications, his business would have to expand sufficiently to make such additional employees economically feasible. Helpers, covered in the MSA contract, were not referenced in Testa's agreement with the Union because helpers had been used only by the larger wholesalers to accompany the drivers. At those bigger companies, drivers were paid just to drive and helpers would unload the pallets of produce. Doghouse operators, including TPI, never had had helpers on their trucks; the drivers did it all. TPI and other doghouse operators merely had had fixed complements of drivers and warehousemen.

Under item 21, contract duration, the parties agreed that the new contract would run for 3 years.

The final provision, item 22, wages for employees who would not be in the new classifications, presented a major issue. The Union asserted that, with the concessions made to the Company, the union membership deserved a substantial pay increase. On December 11, the parties agreed that, on contract ratification, there would be a signing bonus of $700 for each employee then within the unit, that there would be an immediate increase of 45 cents an hour above the then-current pay rates and that, thereafter, every year on the contract anniversary date, the employees would receive a 25-cent-an-hour increase.

Howes, the Respondent's principal negotiator, disputed Testa's testimony that, subject to a ratification vote, all issues were agreed to at the December 11 negotiating session. Howes testified that the Respondent's representatives had objected to at least three items in the final offer, specifically, expressing their disagreement with final offer item 4, time and a half to be paid for all hours worked over 40 hours in 1 week or for 10 hours in 1 day, but not for both; item 16, replacement of the severance fund by an employer-contributed investment fund; and item 20, classifications, where the current number of unit driving positions would be retained and that no more than 80 percent would be classified as ''support help.''

Significantly, Testa, on cross-examination, confirmed Howes' testimony that TPI and the Union had agreed that, except for the above 22 items in TPI's final offer, whatever language ultimately was agreed to between the Union and MSA in the new contract, which those parties then were negotiating, would be put into the Respondent's contract with TPI, as opposed to using language from the old MSA agreement. In other words, the summary of contract terms that

[10] Although employees in the new classifications would pay union dues, they would not have pension benefits or participation in the Company's 401(k) plan which, as discussed, replaced for TPI's employees the severance fund under the old MSA contract.

[11] Testa's concern with competition, as discussed with Howes and Simpson, related to that from large companies with great resources, such as Crisco Foods, Kraft, and Sexton. Such companies only recently had begun selling produce, but they also sold dry and canned goods, and meat, dairy, and paper products to make themselves ''one-stop shops.'' In promoting their other items, these larger concerns did not have to make money on produce that they might use as a ''loss leader.'' Because their produce profit margins were not important, they could undersell TPI.

[12] Although TPI's final offer stated the Employer's agreement covering the 80-percent limitation that only the current number of driver positions then held by bargaining unit employees be retained, Testa emphasized that that language was erroneous in that the agreement actually reached required that the numbers of both driver and warehouse positions employed on December 11 be kept during the contract term and that both of these permanent positions be factored into the unit size when deriving the 80-percent barrier. TPI corrected this error in subsequently draft contracts.

Testa asserted had been agreed to by the Union and TPI on December 11 were to become modifications to the forthcoming MSA contract rather than, as argued by the General Counsel and counsel for TPI, to the expired MSA agreement.

2. The ratification vote

Howes' description of the December 27, 1993 ratification vote was uncontradicted. He testified that, on that date, the Testa membership having petitioned the Respondent for a vote on the contract and union business representatives having gone to the Company's premises to notify TPI's unit employees of the coming contract vote, a meeting was held at the Local 703 offices to enable those employees to vote on TPI's final offer. As described by Howes, the meeting was attended by himself, Business Representatives Sam Seanna and Tyrone Simpson, and 10 to 12 TPI employees who had been covered under the Local 703 contract. The vote followed the taking of attendance and a thorough discussion of the Company's proposals. Before the vote, each employee was given a copy of TPI's final offer,[13] which was reviewed line by line for about an hour. All questions were answered. The ballot used was standard, with a ''yes'' box to be checked to indicate acceptance of the contract and a ''no box'' beneath that to be marked for rejection.

Howes, in advance of the vote, had recommended that the employees reject the Company's final offer because, as noted, the Union objected to three of its provisions—item 4, that time and a half to be paid for all hours worked over 40 hours in 1 week or for 10 hours in 1 day, but not for both; item 16, that the severance fund be replaced by an Employer-contributed investment fund; and item 20, classifications, that the current number of unit driving positions would be retained and that no more than 80 percent of the unit would be placed in the new classifications as ''support help.'' The Union did not like item 4 because it was a departure from the prior MSA agreement under which employees would become entitled to overtime pay after having worked 8 hours in a day; item 16, because the contemplated lower Employer contribution to its own 401(k) investment fund would result in a reduced benefit; and item 20, in that it would establish a two-tiered system of pay and benefits for employees performing bargaining unit work. Depending on the future course of TPI's business, this arrangement ultimately could result in a situation where a majority of TPI's employees worked in these lower-paid new classifications and where, unlike other unit employees, they would receive neither pension nor investment fund benefits. After substantial discussion of these three provisions, Howes recommended against ratification. Nevertheless, as noted, the membership voted to accept TPI's final offer.

Howes emphasized that, before the vote, he had told the employees that the Company-prepared introductory paragraph of the written TPI proposals, distributed to them as the subject matter for ratification, incorrectly specified that all items listed below that paragraph would represent modifications to the (MSA) labor agreement that expired March 31, 1993, all other provisions remaining the same. Notwithstanding that language, Howes related that he had made clear to Testa's counsel at the bargaining table and to the employees before the ratification vote that the basic contract verbiage to be applied to complete the independent doghouse agreements, including that for TPI, would be derived from the MSA contract then being negotiated. Because TPI was the first doghouse to bargain separately with Local 703, the Union intended that much of the language to be included in the TPI contract, when finalized, would become applicable to other companies. The Union did not see the TPI agreement as relating merely to one relatively small employer. According to Howes, the only clauses in the TPI contract that would be different from the new MSA agreement would relate to those ratified provisions not analogously contained in the MSA labor contract.

Howes initially explained that he had submitted the Company's final offer to a ratification vote even though, by his account, the parties had not agreed to all contract terms, because, under the Union's bylaws, he was required to so process all employer final offers. On cross-examination, however, Howes became less clear. Accordingly, Howes testified that while all Teamsters' bylaws were then being reviewed, that Union's representatives were under direction by the Teamsters' general executive board to comply with certain procedures even if they were not within existing (local) union bylaws. At Local 743, Howes' home union, proposed contracts always had been put to ratification votes and Howes had been told to submit to such vote any final proposals made to Local 703. Although he did not recall if the Local 703 bylaws contained such a requirement, at the time, Howes believed that he was required by the International to submit TPI's final offer to a ratification vote. In fact, Simpson had directed him to conduct the vote. The Respondent did not introduce into the record of this proceeding a copy of any Teamsters bylaw that would support Howes' testimony of an obligation to submit for ratification vote any proposed employer offer, final or otherwise.

Howes testified that, once the ratification vote was taken, he had authority to accept the Company's proposals as a ratified contract, which point he communicated to Testa when he called him after the meeting to inform Testa that the contract had been approved. According to Howes, the summary list of contract provisions that was the subject of the vote represented an agreement in principle, pending the writing of the full contract. It also would be necessary to incorporate language from the new MSA contract when that collective-bargaining agreement was put into permanent form because certain provisions clearly contemplated by Testa and the Respondent had not been in the expired MSA contract. Therefore, that agreement could not have furnished relevant base reference language for such includable provisions as the no-strike grievance procedure provision and the drug-testing procedure, which were being negotiated for the first time with the MSA representatives.

Howes testified that on December 27, after the membership had voted to ratify the contract, Howes notified both union trustee Robert Simpson and Testa of the voting results. When Howes called Testa, he told him that the contract had been ratified by a very slim margin;[14] that, in effect, the

[13] Testa related that the document distributed to TPI's employees as the subject matter of the vote, earlier faxed to the Union at his request by Bailey, was a cleaned-up copy of TPI's final offer given to the Respondent during the December 11 bargaining session. The document reflected the changes agreed to that date by the parties.

[14] The contract was ratified by a one vote margin.

Union would wait for the language of the new MSA contract to be drafted; and that the lawyers should ''hash out'' the drafting of the contract between the Union and Testa Produce.[15]

As Testa recalled, the conversation with Howes was simpler and more positive. Testa related that he was called by Howes late in the day on December 27. Howes told him that the men had ratified the contract and that the only thing that needed to be done was to put the contract in final form and get it signed. He wanted Attorney Bailey to take care of this. Testa thanked Howes, declaring that he was glad that everything had gone well.

Also, after learning of the ratification, Testa related that, consistent with the agreement, he directed TPI's bookkeeping department to write a $700 check for each employee as signing bonuses[16] and to institute the higher wage rates effective for current employees the next week. All changes in benefit contributions were to be instituted during the following month.

4. The efforts to obtain an executed agreement

Testa testified that, in February 1994, he received a copy of the drafted agreement from his attorney and, on March 16, 1994, sent a copy to the Union's newly installed secretary-treasurer, Daniel V. Schnur, by certified mail with a cover letter of that date. The letter advised Schnur that Testa was enclosing therewith the new labor agreement between those parties and asked that Schnur contact him to arrange for mutual execution of the agreement. About a week later, Testa phoned Schnur and asked if he had received the contract. When Schnur said that he had not, Testa told him that he had a certified receipt and asked Schnur to look for the document.

Testa, on cross-examination, acknowledged that the draft agreement he had sent to the Union for execution contained certain errors inconsistent with the ratified document. Accordingly, a reference in the submitted draft to a $700 signing bonus on ratification for all employees who were employed on April 1, 1993, and were still employed contradicted the ratified agreement, which had not required for eligibility that current employees also have been employed as of that April date. The March 1994 submission also had been incorrectly drafted in that although, from the ratified language, that provision should have stated that in the two new classifications employees could not exceed 80 percent of a unit that included set numbers of drivers and warehousemen, ''drivers'' had been omitted from the relevant draft provision. Although, as the Respondent pointed out, item 16 of the ratified document, eliminating the severance fund and creating the investment fund, did not exclude repackers-repackers and food service support-utility employees from its coverage, this exclusion was set forth later in items 20(a) and (b).

Schnur[17] testified that when he received TPI's draft contract and March 16 cover letter, he glanced through those papers and turned them over to the local's counsel for advice as to whether to sign the draft or whether changes were needed. Schnur was told at the time that there was no full agreement with TPI and he never was otherwise informed.

On April 5, 1994, while at the Local 703 offices, Testa asked the local's president, Howard Murdoch, if the Union was going to sign the contract. Murdoch answered that the Union was going to have its new attorney look at the contract and get back to him. On the next day, April 6, the Company filed the unfair labor practice charge in Case 13–CA–14384 with the Board's Regional Office, alleging as violative of Section 8(b)(3) of the Act the Union's unlawful refusal to sign the agreed contract. This charge was withdrawn on April 25, according to Testa, after his attorney advised him that the Union was not refusing to sign the contract and would do so if the charge was withdrawn and some minor language changes made. Accordingly, Testa approved the language changes that had been discussed between his and the Union's attorneys and withdrew the charge.

The approved changes, which included correcting above-indicated inconsistencies between the ratified document and the March 1994 draft, were incorporated in a new draft contract that Testa reviewed in May 1994 with his current attorney, Scott A. Gore, and forwarded to the Union for signature.

The Company's May 1994 draft was prepared in response to what had been received from the Union counsel's office some time between April 1–25, 1994. The parties, as noted, stipulated that, in that period, Robert E. Bloch, counsel for the Union had requested a paralegal in his office to compare marked-up versions of TPI's ratified final offer, the Company's March 1994 draft and the expired MSA contract. In her subsequent undated handwritten memorandum to Bloch, the paralegal reported that she had listed, given the locations of and, in different colors, had highlighted modifications to the (old MSA) agreement. Bloch had reviewed these changes only cursorily before sending them with no indicated separate comment to TPI's new attorney.

Schnur related that, in early May 1994, Testa asked him at the Local 703 offices why he had not signed the agreement. Schnur replied that he had turned it over to the Union's attorney. Testa declared that he thought that he had a done deal. Schnur told him that he did not have a done deal.

[15] No further progress was made by the Union and TPI toward signing an agreement by January 28, 1994, when, as noted, the Local 703 trusteeship ended; Simpson and Howes relinquished their positions with that local; and its elected officials assumed control.

[16] The checks Testa brought to the hearing as evidence of the payment of the $700 signing bonuses were not offered because they predated the December 27 ratification vote and might have been the wrong checks. The Respondent, in turn, argues that the checks had been improperly distributed in advance to influence the vote. As these checks are not put into the record by either party, however, it has not been established by best evidence either that the signing bonus was paid in accordance with the contract provisions or that the checks were given to employees at a time when they might wrongfully have affected the outcome of the vote.

[17] Schnur related that his 10- to 15-minute interview in his office with Howes on February 1, 1994, had been their only meeting to discuss the affairs of the Union. Their relationship was not close as Schnur and the other elected union officers had had to stage an 8-month fight to take over the Union because the trustees had not wanted to give up control. Howes informed Schnur that some contracts were not yet finished and required additional work. In this regard, Howes named three or four, including the MSA and TPI agreements. Howes informed Schnur that the TPI contract had been ratified and he also identified some contracts that had been completed.

Schnur testified that he had not understood what TPI's later withdrawn April 6 unfair labor practices charge was about and had forwarded it to the Union's attorney. He emphasized, however, that the charge's withdrawal in that case had not been accompanied, or tied to any contractual arrangement with Testa. Only Schnur could agree to a collective-bargaining agreement and only he and the Union's president, Murdoch, in consultation with the Respondent's Union's executive board, were authorized to sign labor agreements on the Union's behalf. Schnur iterated that he had not authorized anyone, including his attorneys, to enter into a labor contract with TPI.

D. *Discussion and Conclusions*

In his Board-approved decision in *Teamsters Local 471 (Superior Coffee)*,[18] Administrative Law Judge Jay R. Pollack set forth the following applicable principles:

> Section 8(b)(3) of the Act provides: ''It shall be an unfair labor practice for a labor organization or its agents—(3) to refuse to bargain collectively with an employer, provided it is the representative of its employees subject to the provisions of Section 9(a).'' Section 8(d) of the Act explicitly requires the parties to a collective bargaining relationship to execute ''a written contract incorporating any agreement reached if requested by either party.'' *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). ''When an oral agreement is reached as to any of the terms of a collective bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing, and a failure or refusal to do so constitutes'' a violation of Section 8(b)(3) of the Act. *Liberty Pavilion Nursing Home*, 259 NLRB 1249 (1982); *Interprint Co.*, 273 NLRB 1863 (1985). ''It is well established that technical rules of contract do not control whether a collective bargaining agreement has been reached.'' *Pepsi Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981). Rather, the crucial inquiry is whether there ''is conduct manifesting an intention to abide and be bound by the terms of an agreement.'' *Capital-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982).
>
> In determining whether underlying oral argument has been reached, the Board is not strictly bound by technical rules of contract law but is free to use general contract principles adopted to the bargaining context. *Americana Health Care Center*, 273 NLRB 1728 (1985). The burden of proof is on the party alleging the existence of the contract. *Cherry Valley Apartments*, 292 NLRB 38 (1988).
>
> The General Counsel must show not only that an agreement was reached, but that the document which Respondent has refused to execute accurately reflected that agreement. *Electrical Workers IBEW Local 1464 (Kansas City Power)*, 275 NLRB 1504 1985; *Pacific Coast Metal Trades Council (Foss Shipyard)*, 260 NLRB 1117 (1982); *OCAW, Local 7-507 (Capital Packaging)*, 212 NLRB 98, 108 (1974).

[18] 308 NLRB 1, 2 (1992).

Also, as held in *Kennebec Beverage Co.*, [19] part of the Section 8(d)-imposed duty to execute a written collective-bargaining agreement when requested is the obligation to assist in reducing the agreement reached to writing. The mere fact that an addition may be required does not relieve the Respondent of its obligation to help finalize and, ultimately, to execute the collective-bargaining agreement on which the parties agreed.

In *Teamsters Local 617 (Christian Salvesen)*,[20] the Board affirmed the obligation of parties who have executed a summary Memorandum of Agreement (MOA) to also execute a full collective-bargaining agreement incorporating the terms agreed to in the MOA. The administrative law judge in *Christian Salvesen*, supra, quoting from *Retail Clerks Local 322 (Ramey Supermarkets)*,[21] provided the following rationale for the requirement that parties to summary accords proceed to full written contract:

> By its terms, a memorandum is incomplete. By present notation and reference to other material, it serves the parties' immediate purposes to terminate the dispute between them until a more permanent record of their agreement can be prepared. . . . Experience with memoranda shows that, because they are incomplete and sometimes not too clear, they tend to become a source of disagreement and discord unless soon translated into more complete and precise documents.

Therefore, as stated in *Christian Salvesen*, supra at 603, the requirement that the parties to an incomplete summary understanding of contract terms work actively to prepare and execute a complete and precise collective-bargaining agreement is to lessen the prospect of interpretative disagreements. In the present matter, TPI's final offer, once ratified, became functionally analogous to the executed Memorandum of Agreement (MOA) in *Christian Salvesen*, supra, and both parties bore the same resultant bargaining obligation of working together to finalize and execute a complete collective-bargaining contract incorporating the terms of the original summary agreement.

Here, after two bargaining sessions, the Respondent Union submitted the Employer's final offer for ratification vote and, against the recommendation of the union officials who conducted the vote, the agreement was ratified in its summary form. In reaching the conclusions here, I credit Howes' testimony that the parties on December 11 did not reach full agreement on all terms of TPI's final offer, even after the 5 hours spent in negotiations; that Howes and the other union representatives had not agreed to the three above-referenced provisions of the final offer that Howes testified were objectionable; and that he had reiterated this view to the employees at the ratification meeting in unsuccessfully recommending that they reject the offer. In so finding, I note that Howes' account of the events at the ratification meeting, including what he had told the employees, was uncontradicted. Also, as Howes, in effect, testified, the Union had a special interest in maintaining uniform terms and conditions of employment at the Market among the various employees of about 60 employers it there represented and was cognizant

[19] 248 NLRB 1298 (1980).
[20] 308 NLRB 601, 602–603 (1992).
[21] 226 NLRB 80, 87 (1976).

of its potential problems in that major workplace if it did not maintain a sufficient parity. Because, as noted, a substantial number of the provisions in the Employer's final offer were detrimental to that purpose, it is difficult to perceive that the union representatives would have agreed to all the Company's economic proposals, as described by Testa.

Nevertheless, the Union, as stated at the final negotiating session, did submit the Company's offer to the ratification vote. Whether it did so out of a misunderstanding of what was required under the bylaws; whether it so proceeded because the affected unit employees had petitioned for a vote; whether for both of those reasons or for others not expressed, the vote went forward at the Union's option. The result was employee acceptance of the final offer. Here, as in *Superior Coffee*, supra, the parties had agreed that the contract was conditioned only on ratification by the unit employees, which prerequisite was met on December 27, 1993. There is no evidence that TPI had agreed that the Respondent Union could condition execution of the agreement on approval of its chief executive officer. As stated in *Superior Coffee*, ''If the Union required such approval, it should have obtained it prior to ratification.'' As also held in *Superior Coffee*, when Howes informed Testa that the contract had been ratified, the sole condition precedent had been removed and an oral agreement had been reached. The bargaining unit employees' ratification of TPI's final offer at once accepted the terms and conditions of that offer and, in terms of binding the Union, effectively overcame any prior objections that Howes and other union negotiators might have had to certain provisions.

The Respondent's arguments, which appear to discount the significance of the ratification vote with respect to its bargaining obligation in this matter, is somewhat matched by the disregard of the General Counsel and TPI for the importance of Testa's above-noted testimony on cross-examination that TPI and the Union had agreed on December 11 that the Company's final offer, if ratified, would be in modification of the MSA agreement that then also was being negotiated. Therefore, the missing language needed to finalize the agreement would be drawn from the new, rather than the old, MSA contract. TPI's ratified final offer apparently anticipated and was consistent with this finding in that certain ratified provisions, including that for the no-strike grievance procedure and the establishment of a drug and alcohol testing program, had not been in the expired MSA contract and, accordingly, the relevant wording for those items could not be taken from the old agreement. In the case of the drug and alcohol testing program, it was agreed that the Union's language would be used. As those provisions were being negotiated for the first time into the new MSA contract, it was unlikely that the parties intended that TPI be given language in its labor contract that materially differed from what would be generally applicable in that area. Although the interest of the General Counsel and TPI in relating the ratified economic terms to the physically extant expired contract is understandable as it would make the immediate content of the new TPI collective-bargaining agreement more perceptible and thereby more readily vindicate in conventional terms the violation alleged in the complaint, these parties' arguments as to what was agreed to in this regard are inconsistent with the undisputed evidence. Ironically, Howes, by telling the employees before the ratification vote to disregard the Employer's introductory paragraph in the distributed final offer to the extent that it noted that the there-summarized terms would be modifications to the old MSA collective-bargaining agreement on the ground that the terms actually were to relate to the contract that then was being negotiated, ensured both the vote's accuracy and validity. This was because by conforming the language of the distributed copies of the final offer to the parties' actual understanding, he enabled a vote on that basis.

It is basic to a meaningful bargaining process that parties be permitted to have the benefits of their duly-negotiated contract terms and the 8(d) requirement that agreed written contracts be executed is consistent with that purpose. Yet, attainment of this goal is rendered more complicated in this case by the parties' agreement to incorporate prospective language from the still not finalized MSA contract. It is not presently clear as to just when such a version of that document will be available. The Respondent, by not yet having executed the new MSA contract, is doing little to help. Yet, some of that language that is not in dispute might be available to begin the process of finalizing the TPI contract.

From the visible pattern, this Respondent has followed a practice of submitting contract proposals to its membership for ratification vote, not in the format of complete, or fully drafted contracts, but in the summary structure utilized here. The new MSA agreement was ratified in essentially the same summary format just a week before the vote on TPI and, in Administrative Law Judge Thomas R. Wilks' recent decision in *Teamsters Local Union No. 703 (Anthony Marano Co.)*,[22] a ratification vote was taken there, too, on summary proposals by the employees of another produce wholesaler located in the same Chicago Market. A result of this practice is that, in contracting with this Union, much additional language must be worked out before ratified provisions can be embodied in a finalized written contract possible of execution. As the proponent of this method of ratification, it, therefore, becomes incumbent on the Union to help preserve and bring to fruition the ratified contract terms by actively assisting in the consequent drafting process.[23]

In the present case, as the Respondent's counsel acknowledges in his brief, such contract drafting assistance neither was given nor offered. Instead, the Respondent, in effect, simply placed TPI's drafts proffered for signature in indefinite cold storage in its attorney's office vaults while, in this case, offering a series of defenses that go beyond its acceptable basic premise that, because the ratified provisions were to be modifications of the new, rather than the expired, MSA collective-bargaining agreement, the Union could not be obliged to execute a draft that did not incorporate applicable language of that still-uncompleted association labor contract. The Union's additional defenses include a contention that the Union should not be compelled to execute an agreement based on a tainted ratification process;[24] and that, in spite of

[22] Case 13–CB–14424 (June 27, 1995) (not reported in Board volumes.)

[23] *Kennebec Beverage Co.*, supra.

[24] At the hearing, the Respondent offered to prove that the ratification process was tarnished in that, soon after that vote, TPI hired the Union's business agent, Tyrone Simpson, son of then-trustee Robert Simpson. The assertion is that TPI, thereby, had provided the Union's management with something of assertedly compromising value. Although the record shows that Tyrone Simpson had been on

Continued

the ratification vote, there still had been no meeting of the minds on a contract, citing Howes' subsequently preempted preratification objections to certain terms of the final offer. The Union's argument that TPI's final offer was internally inconsistent in that item 16, which set up TPI's investment fund to replace the MSA contractual severance fund, did not exclude repackers-repackers and food service support-utility employees from participation is answered by the provisions of item 20, which more specifically related to employees in those new classifications and that made clear that they would receive health and welfare as their only job benefit. Any reference in item 16 to participation in the investment fund by all unit employees necessarily referred to the then-current unit employees as a two-tiered compensation system had been contemplated and ratified by the employees.

Because, as found above, the parties had agreed to use applicable language from the new MSA contract in their own agreement and the evidence does not indicate that the draft contracts sent to the Union for signature embodied such language, contrary to the General Counsel and TPI, the Union's refusal to bargain cannot be premised on its failure to execute the previously submitted drafts. Instead, the Respondent's demonstrated unwillingness to help prepare, or to be bound by, any written agreement incorporating the ratified concessions has made it unlikely that a mutually acceptable completed contract can voluntarily be readied for execution. Therefore, as in *Christian Salvesen*, supra, I base my finding that the Respondent Union has violated Section 8(b)(3) of the Act, on its refusal to accept the ratified final offer provisions as a basis for a new collective-bargaining agreement with TPI and on its resultant unwillingness to proceed from there to help prepare and to execute a completed collective-bargaining agreement. To hold otherwise would be to reward the Respondent for avoiding not only execution of a written collective-bargaining agreement, the violation alleged in the complaint, but its preparation, as well.[25] Because Bailey no longer represents Testa, of the two parties, the Union most certainly would have superior current access to any applicable language in the new MSA contract that might enable completion of its labor agreement with TPI.

CONCLUSIONS OF LAW

1. The Charging Party, Testa Produce, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing since late May 1994 to finalize with the above Employer and execute a collective-bargaining agreement containing the terms and conditions of employment set forth in the Employer's final offer, ratified by bargaining unit employees on December 27, 1993, the Respondent has violated Section 8(b)(3) of the Act. The appropriate bargaining unit is:

> All full-time and regular part-time drivers, warehouse persons, food service support-utility employees and repackers-repackers employed by Testa Produce, Inc., at its Chicago, Illinois, facility, but excluding all sales personnel, office clerical employees, maintenance and quality control personnel, guards and supervisors within the meaning of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and that it be ordered to join with TPI

the Union's negotiating team during the first bargaining session with TPI, but not the second, and was present at the meeting when the ratification vote was taken, it contains no evidence that he had said anything on either occasion or of any action on his part to influence events. The ratification meeting was conducted by Howes who, uncontradicted by either Simpson, advised against acceptance. Because Tyrone Simpson did not become employed by TPI until after the ratification vote, he did not then cast a ballot so as to have contributed to the narrow margin for acceptance. Accordingly, I find no relevant significance in TPI's later employment of Tyrone Simpson. These additional defenses when combined with the Union's refusal to further the bargaining process by helping to draft the additional contract language needed to finalize a collective-bargaining agreement containing the previously ratified provisions, and the Union's entire bargaining posture here, persuasively indicate that the Union will not voluntarily join with TPI in preparing and/or executing a labor contract embodying those ratified provisions. My interpretation of the Union's bargaining posture stems from the fact that, since the December 27 vote, the Respondent's current officials have limited themselves to indefinitely storing away TPI's proffered contract drafts, to criticizing various provisions without offering meaningful counterproposals and, generally, to refusing any form of cooperation. The Union's counsel even stipulated that he had disassociated himself from any meaningful review of a submitted draft. The Respondent has not declined to sign the draft agreements submitted by TPI merely because the language of the new MSA contract was not sufficiently settled to enable its use in finalizing the Union's agreement with TPI. It also has raised the other indicated arguments, including continued objections to the content of the ratified terms in stating why it should not go forward. At the same time, the Union has done what it could to passively obstruct the process. Accordingly, I find that the Union's refusal to further the bargaining process is based on its abiding objections to certain ratified provisions and that its arguments for not advancing the bargaining process are pretextual.

[25] Judge Wilks' decision in *Teamsters Local 703 (Anthony Marano Co.)*, supra, cited by the Respondent, although, in part, involving the same Market location, union, and industry, is distinguishable from the present matter in two ways. First, in Anthony Marano, unlike here, the ratification vote to accept the summary final offer was of doubtful validity because an even larger number of employees employed within the same bargaining unit at that Employer's second location, away from the Market, were not given the opportunity to vote on that Employer's final offer. This was so even though most of the affected employees who worked in the relevant repackers-repackers classification were located at that disenfranchised workplace. Second, because the parties in Anthony Marano had agreed that the ratified provisions were to be amendments to the old, expired MSA contract, the discrepancies between the submitted draft contract and the expired MSA agreement, found sufficient to warrant the Union's rejection, related to differences in extant contract language. Here, unlike Anthony Marano, the final offer referred prospectively to an, as yet, unfinalized new MSA bargaining agreement the provisions of which are not a part of the present record. Therefore, any conflict between the drafts forwarded by TPI and the new MSA contract cannot be verified at this time and, with the Union's thus-far unrendered cooperation, any such problems might well be resolvable.

in the finalization and execution of a collective-bargaining agreement containing the terms and conditions of employment ratified by the Respondent's bargaining unit employees on December 27, 1993. This process should be completed within a reasonable time after the execution of the new MSA collective-bargaining agreement. Consistent with the parties' understanding, such executed contract should continue in force for a period of 3 years from its effective date.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Produce, Fresh & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florists, Nursery, Landscape & Allied Employees, Drivers, Chauffeurs, Warehousemen & Helpers, Union Local 703, International, Brotherhood of Teamsters, AFL–CIO, its officers, agents, representatives and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Employer, Testa Produce, Inc., by refusing to finalize with the Employer and execute a collective-bargaining agreement containing the terms and conditions of employment set forth in the Employer's final offer, ratified on December 27, 1993, by employees in the following appropriate bargaining unit:

> All full-time and regular part-time drivers, warehouse persons, food service support-utility employees and repackers-repackers employed by Testa Produce, Inc., at its Chicago, Illinois, facility, but excluding all sales personnel, office clerical employees, maintenance and quality control personnel, guards and supervisors within the meaning of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, finalize and execute a collective-bargaining agreement with the Employer containing the terms and conditions of employment ratified on December 27, 1993, by bargaining unit employees.

(b) Post at its union office in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[27] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Testa Produce, Inc., if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the Employer, Testa Produce, Inc., by refusing to finalize and execute a collective-bargaining agreement containing the terms and conditions of employment set forth in the Employer's final offer, ratified on December 27, 1993, by employees in the following appropriate bargaining unit:

> All full-time and regular part-time drivers, warehouse persons, food service support-utility employees and repackers-repackers employed by Testa Produce, Inc., at its Chicago, Illinois, facility, but excluding all sales personnel, office clerical employees, maintenance and quality control personnel, guards and supervisors within the meaning of the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, finalize with the Employer and execute a collective-bargaining agreement containing the terms and conditions of employment ratified on December 27, 1993, by employees in the above-described bargaining unit.

> PRODUCE, FRESH & FROZEN FRUITS & VEGETABLES, FISH, BUTTER, EGGS, CHEESE, POULTRY, FLORISTS, NURSERY, LANDSCAPE & ALLIED EMPLOYEES, DRIVERS, WAREHOUSEMEN & HELPERS UNION LOCAL NO. 703, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''